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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-5435

PAUL KERN IMBLER,

Petitioner,

vs.

RICHARD PACHTMAN, District Attorney,

Respondent.

On a Petition for a Writ of Certiorari Directed to the Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

Questions Presented.

1. Is there any substantial question as to whether a prosecutor has quasi-judicial immunity from suit under the Civil Rights Act for claims relating to his questioning of a witness in the course of a trial?

2. Is there any direct conflict among the circuits as to whether a prosecutor has quasi-judicial immunity from suit under the Civil Rights Act for claims relating to his questioning of a witness in the course of a trial?

3. Are the differing results between the decision of the Ninth Circuit in this case and the decisions of other circuits cited by petitioner explicable in terms of the different factual contexts of the decisions?

ARGUMENT.

I.

Introduction.

The antique dates of this Civil Rights Act damage claim and its convoluted progress to this point underline the need for quasi-judicial immunity for prosecutorial actions which constitute an integral part of the judicial process.

If petitioner were to prevail, deputy district attorney Pachtman would in 1975 be called upon to defend his actions in questioning witnesses during the 1961 murder trial of petitioner.

Petitioner would have it that whenever a convict wins a federal habeas corpus action he should have free rein to sue any state official who participated in his conviction. Such a rule would strain the already taxed state criminal justice system and would warp the habeas corpus procedure itself by introducing a new background element of potential damage actions.

The Ninth Circuit's decision in *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533 is the best exposition of the parameters of quasi-judicial immunity for prosecutors. That decision has been approved by other circuits in opinions including those relied upon by petitioner as supposedly indicating a conflict among the circuits. The present case clearly presents a case of prosecutorial quasi-judicial immunity within the purview of the *Robichaud* decision.

Certain decisions of other circuits, cited by petitioner and discussed herein, admittedly tend to confuse the concept of a defense or a qualified immunity with that of judicial immunity from suit. However, their holdings do not directly conflict with the holding in this case.

II.

Background of the Claim.

From reading the emotional petition filed in this case, one would believe that the defendant had by vilest of misdeeds secured the conviction of an innocent man. Such is not the case.

Petitioner herein was convicted of murder and assault with a deadly weapon for an incident committed on January 4, 1961 [C.R. 9]. Petitioner appealed his conviction to the California Supreme Court which in a full opinion reviewing the evidence held:

> "At the trial defendant denied participating in the crime. His defense consisted primarily of an alibi and impeachment of the identification witnesses. The evidence, however, was more than sufficient to establish that he did the shooting." *People v. Imbler* (1962) 57 Cal.2d 711, 713.

Petitioner then sought habeas corpus relief in the California courts. The California Supreme Court appointed Justice White, a retired Justice of that court, as a referee to take evidence concerning whether any witness who had testified against petitioner had committed perjury and, if so, whether any representative of the State had caused or suffered such to be knowingly introduced at trial or had suppressed evidence favorable to petitioner. Based upon the referee's findings, the California Supreme Court in a full opinion reviewing the facts held that no perjured testimony had been given and that no favorable evidence had been suppressed. *In re Imbler* (1963) 60 Cal.2d 554. On a later writ, the Supreme Court set aside the death penalty imposed on petitioner. *In re Imbler* (1964) 61 Cal.2d 556.

Several years later, the petitioner filed a federal habeas corpus petition alleging essentially the same bases for overturning his conviction. The district court did not conduct a separate hearing but merely reviewed the state court's record:

> "A federal evidentiary hearing on the petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court." *Imbler v. Craven* (C.D. Cal. 1969) 298 F.Supp. 795, 797.

Surprisingly, the district court in reviewing the record before the California Supreme Court, rejected the conclusions reached by that Court and its distinguished referee, despite the fact that the Supreme Court had noted that the referee ". . . had the opportunity to observe the witness [Costello] and judge his credibility and demeanor" as to the alleged perjured testimony (*In re Imbler, supra,* 60 Cal.2d at 562). *Imbler v. Craven, supra,* affirmed *Imbler v. California,* 424 F.2d 631 (9th Cir. 1970).

The district court concluded that certain "false," not perjured, testimony was given by two of the prosecutor's four identification witnesses which was material to their credibility. *Imbler v. Craven, supra,* 298 F. Supp. at 803. The district court found only that the prosecutor should have known of the "falsity," or incorrectness, of these items of testimony.

> "Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony." *Imbler v. Craven, supra,* 298 F.Supp. at 809.

III.

Claim Relates to Acts Which Form Integral Part of Role of Prosecutor.

Petitioner's claims boil down to three activities of deputy district attorney Pachtman which petitioner alleges were performed in an unlawful manner. These activities were: (1) "charging" petitioner with the crimes of which he was convicted [C.R. 94, line 6]; (2) "convicting" petitioner of these crimes [C.R. 94, lines 7-8]; and (3) "knowingly" using "testimony at said trial via witnesses." [C.R. 96, lines 6-8].

Clearly, all of these activities are ones which form an integral part of the role of a prosecutor. The district court and the Ninth Circuit Court of Appeals so held:

> "The acts of the defendant [Pachtman] which allegedly harmed appellant occurred during prosecutional activities which can only be characterized as an 'integral part of the judicial process.' All involved the questioning of a witness during the 1961 criminal prosecution." *Imbler v. Pachtman* (9th Cir. 1974) 500 F.2d 1301, at 1302-1303 (footnotes omitted).

This is not a case of a prosecutor planning raids, investigating crimes, or planting evidence where the argument might be made that the prosecutor was not acting in his quasi-judicial capacity. Rather, the allegations are that the prosecutor here performed his prosecutional duties maliciously and in bad faith.

Unlike a defense, such as the defense of good faith, or the "qualified immunity" of executives from damages (*Scheuer v. Rhodes* (1974) .... U.S. ...., 40 L.Ed. 2d 90), judicial immunity bars suit and, consequent-

ly, inquiry into motive or purpose if the action is of the objective nature covered by the immunity.[1] The very purpose of judicial immunity as opposed to a defense or to a "qualified immunity" is to prevent the expenditure of time and energy and the resulting adverse effects of defending actions of a particular character.

> "The immunity doctrine would be of little value if such characterization of his motive could force the prosecutor to stand trial." *Hampton v. City of Chicago* (7th Cir. 1973) 484 F.2d 602, 608.

IV.

No Direct Conflict Among Circuits.

While several circuits have held that a claim may be stated against a prosecuting attorney for certain of his actions, there is no direct conflict between the holdings in these decisions and the instant case.

First, all of the cases have recognized that a prosecutor is entitled to quasi-judicial immunity for at least certain types of actions performed within the scope of his official duties as a prosecutor. *Hilliard v. Williams* (6th Cir. 1972) 465 F.2d 1212, 1217; *Hampton v. City of Chicago* (7th Cir. 1973) 484 F.2d 602, 608; *Holton v. Boman* (7th Cir. 1974) 493 F.2d 1176, 1178-1179; *Imbler v. Pachtman* (9th Cir. 1974) 500 F.2d 1301, 1302-1303.

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[1]Judicial immunity covers "*acts* within the judicial role"; similarly legislative immunity covers "legislative *acts* . . . in a field where legislators traditionally have the power to act." *Scheuer v. Rhodes, supra,* .... U.S. ...., 40 L.Ed.2d at 101 (emphasis added).

Second, all of these cases cite with approval the holding of the Ninth Circuit in *Robichaud v. Ronan* (9th Cir. 1965) 351 F.2d 533 in which the court said:

> "We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? (Citations) To us it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Robichaud, supra,* 351 F.2d at 536-537; see *Hilliard v. Williams, supra,* 465 F.2d at 1217; *Hampton v. City of Chicago, supra,* 484 F.2d at 608 (quoted in full); *Holton v. Boman, supra,* 493 F.2d at 1178 (quoted in full); and *Imbler v. Pachtman, supra,* 500 F.2d at 1302.

Third, the facts in each case permit the decisions to be read in a manner which poses no direct contradiction among the opinions of the circuits.

In this case, the actions complained of were restricted to courtroom questioning of a prosecution witness. *Imbler v. Pachtman, supra,* 500 F.2d at 1302. The case involves no out-of-court investigatory or police activities and no out-of-court activities in physically manufacturing or concealing evidence.

The *Hampton* case involved allegations of the planning and execution of a search and destroy raid on a Black Panther headquarters. *Hampton, supra,* 484 F.2d

at 608. Within the *Robichaud* definition, such activity might, subject to proof, constitute police rather than prosecutorial activity.

The *Holton* case cites *Hampton, supra,* as describing the law. *Holton v. Boman, supra,* 493 F.2d at 1178. The *Holton* complaint alleged that the prosecutor on specific dates engaged in activities to deprive the plaintiff of his property. The court concluded:

> "However, when he [the prosecutor] is properly alleged to be guilty of conduct *of a character not in the field of his prosecutorial authority or duty,* the pleading against him may not be dismissed as not stating facts which if proven would subject him to liability." *Holton v. Boman, supra,* 493 F.2d at 1179 (Emphasis added).

The *Hilliard* case treats us to a parade of horribles consuming almost three pages in the appellate reports. *Hilliard v. Williams, supra,* 465 F.2d at 1214-1217. Among the horribles are allegations that the prosecutor, having proof positive that there were no bloodstains on plaintiff's jacket, introduced evidence that there were such bloodstains, suppressed evidence that there were not such bloodstains, and kept the jacket concealed from plaintiff's counsel during trial. *Hilliard v. Williams, supra,* 465 F.2d at 1215-1216. The court concludes this list by holding:

> "We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" *Hilliard v. Williams, supra,* 465 F.2d at 1218.

It should be noted that the quoted phrase 'duties constituting an integral part of the judicial process' finds no reference in the opinion. The well reasoned *Robichaud* decision instead discusses the "integral relationship between his acts and the judicial process." 351 F.2d at 536. Of course, it would never be a "duty" of the prosecutor to be malicious. However, the "act" of questioning a witness is an integral part of the judicial process, even if it were done with a malicious purpose.

The *Hilliard* court then concludes gratuitously that:

> "We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging the deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." *Hilliard v. Williams, supra,* 465 F.2d at 1218.

While lacking the thorough theoretical analysis of the Ninth Circuit's decision in this case, and admittedly tending in a different direction, the *Hilliard* case does not directly contradict the holding in this case.

This case deals with the alleged eliciting of "false" testimony which tended to prevent the defense from obtaining information material to the impeachment of two of the prosecution witnesses. There was no suppression of any report or other evidence directly establishing the innocence of petitioner.

Hilliard is essentially an opinion dealing with facts rather than with an analysis of legal principles. Its scant statement of legal reasoning can and should be limited to the facts of the case, in which event there is no direct conflict between *Imbler* and *Hilliard*.

V.

Conclusion.

This case involves actions which are at the core of a prosecutor's quasi-judicial duties: the questioning of witnesses during a trial. If any part of a prosecutor's duties are to be immune from suit, the decision in this case must stand. The elective district attorney, of course, remains responsible for his actions to the electorate and, like judges, is subject to criminal sanctions for abuse of the civil rights of persons within his jurisdiction. *O'Shea v. Littleton* (1974) .... U.S. ...., 38 L.Ed. 2d 674, 687.

There is no necessary conflict between decisions of the Courts of Appeals relating to damage actions against prosecutors. The decision of the Ninth Circuit in this case is clearly correct and no further hearing is required. Therefore, the petition for writ of certiorari should be denied.

Dated: January 13, 1975.

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